In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF FOR THE UNITED STATES

Respondents in this case, as in the companion case, No. 87, have consistently refused to recognize the significant difference between the reserved water rights of the United States and water rights it acquires by appropriation under state law or by purchase from other appropriators. Thus, in No. 87, they assert (Br. 30–37) that there is no need even to discuss the reservation doctrine because the United States has not yet specified its exact claims thereunder and consequently has not yet been deprived of

417-441—71

any rights. And here (Br. 10, 14), respondents insist that the distinction between reserved rights and rights acquired under state law is irrelevant because any possible harm to or loss of the former is speculative.

As we pointed out in our opening brief in No. 87 at page 12, 43 U.S.C. 666 does not refer to reserved rights and would appear syntactically, in fact, to exclude them. We showed there (No. 87, Br. 12–15) that the pertinent legislative history indicates that Congress was concerned primarily with the difficulties encountered in ordinary general water adjudications where rights acquired under state law were asserted. Such adjudications as a practical matter could not be accomplished where the United States owned or claimed rights acquired under state law. To alleviate that problem, Congress passed 43 U.S.C. 666 permitting the United States to be joined as a defendant in state water right adjudications when certain conditions had been met. The rights of the United States acquired under state law can then be determined and correlated with those of other water claimants.

Contrary to respondents' assertions (Br. 12), construction of the consent statute to apply to reserved rights would not significantly advance state water right adjudications. The need and reasonable requirements for water on federal lands withdrawn from the public domain are continuously changing to accomplish the purposes for which the withdrawals were made. The establishment of the Naval Oil Shale Reserve, for example (see p. 7 of our brief in this case), contemplated a need for water for the future development of the oil

shale. Because no satisfactory method of utilizing that resource has yet been discovered, the exact amount of water needed cannot be ascertained at this time. Similarly, although perhaps to a lesser extent, the water requirements for the national forests vary as conditions change and as better methods of silviculture are developed. We do not contend that these examples prove that the water requirements of a federal reservation can never be quantified. See *Arizona* v. *California,* 373 U.S. 546, 596, 601. But it is clear that the requirements of many reserves cannot be fixed for all time at a given instant. Consequently, even if 43 U.S.C. 666 included consent to reserved right adjudication, the fixed finality of all rights *inter sese* could not be attained and any decree would, of necessity, remain open-ended to accommodate future quantification of reserved rights as development plans for federal lands progress. Accordingly, any attempted adjudication of reserved water rights in state proceedings would only needlessly complicate the adjudicatory process by which rights arising under state law are established. Given these facts plus the fact that appropriative water rights were the focal point of Congress' concern, we submit that it would be inappropriate to construe 43 U.S.C. 666 to cover reserved water rights.

Again contrary to respondents' contentions (Br. 15–18), the procedures embodied in the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148–21–1 *et seq.,* are not adequate to protect the reserved water rights of the United States.

The 1969 Act provides for monthly determinations and states that all water rights awarded in such proceedings shall be junior to rights awarded in previous years or embodied in decrees entered prior to the effective date of the Act. Thus, under the new Colorado procedure, the United States is precluded from obtaining a priority based upon pre-1969 withdrawals or reservations, and any rights awarded (reserved or other) would be junior to all prior awards or decrees, regardless of the date of actual appropriation or reservation. A statutory scheme leading to such a result is plainly inconsistent with the reserved rights of the United States as defined by this Court in *Arizona* v. *California,* 373 U.S. 546, 595–601. There is no reason to believe that Congress intended in 43 U.S.C. 666 to subject the federal reserved rights to such possible diminution.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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